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No. 90-816

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In the Supreme Court of the United States

OCTOBER TERM, 1990

KAYSER-ROTH CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a parent corporation is liable under the Comprehensive Environmental Response, Compensation, and Liability Act for response costs resulting from the release of hazardous substances at a subsidiary corporation's facility where the parent participated in the operation of the facility.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-815

KAYSER-ROTH CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 910 F.2d 24. The opinion of the district court (Pet. App. 9a-27a) is reported at 724 F. Supp. 15.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1990, and a petition for rehearing was denied on August 24, 1990 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on November 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Kayser-Roth, Inc. was the corporate parent of a wholly owned textile subsidiary, Stamina Mills, Inc., from

1966 until the subsidiary's dissolution in 1977. The United States brought this action against Kayser-Roth, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, to recover the government's expenditures in cleaning up contamination from releases of a hazardous substance, trichloroethylene (TCE), at the Stamina Mills site. The United States District Court for the District of Rhode Island entered a declaratory judgment holding Kayser-Roth liable for the government's past and future response costs at the site. Pet. App. 9a-29a. The court of appeals affirmed. *Id.* at 1a-8a.

1. CERCLA enhances the Environmental Protection Agency's (EPA's) authority to deal effectively with the release of hazardous substances into the environment. See generally *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989). Under Section 104(a)(1) of CERCLA, 42 U.S.C. 9604(a)(1), EPA may take direct "response" actions to abate any actual or threatened release of any hazardous substance. 42 U.S.C. 9604(a)(1). Congress has established the Hazardous Substance Superfund to pay for federal response actions. See 26 U.S.C. 9507. CERCLA provides that the federal government may bring cost recovery actions pursuant to Section 107(a)(4)(A), 42 U.S.C. 9607(a)(4)(A), to replenish the fund when EPA has expended money in performing response actions. Sections 107(a)(4)(B) and 113(f) of CERCLA also permit non-governmental parties to recover their necessary costs of response in certain circumstances. See 42 U.S.C. 9707(a)(4)(B); 42 U.S.C. 9613(f).

A party seeking recovery of response costs under CERCLA must establish four elements: (1) the defendant falls within one or more of the classes of liable persons described in Section 107(a); (2) the site is a "facility" as defined in Section 101(9); (3) a "release" or "threatened release" of a "hazardous substance" has occurred or is occurring; and (4) the release or threatened release has caused the party

to incur "response costs." 42 U.S.C. 9607(a). See, *e.g.*, *United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 991-992 (D.S.C. 1984), aff'd *sub nom. United States* v. *Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), cert. denied, 491 U.S. 600 (1989).[1]

As to the first of these four elements, CERCLA establishes four broad classes of liable persons: (1) the owners and operators of hazardous substance facilities and sites; (2) persons who owned or operated a facility at the time hazardous substances were disposed of at that facility; (3) persons who arranged for disposal or treatment of the hazardous substances; and (4) persons who transported the hazardous substances and selected the disposal facility. § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4). CERCLA defines the term "owner or operator" to include "any person owning or operating such facility," § 101(20)(A), 42 U.S.C. 9601(20)(A), and it defines the term "person" to include "an individual, firm, corporation, association, partnership, consortium, [or] joint venture," § 101(21), 42 U.S.C. 9601(21).

2. Kayser-Roth manufactures and markets textiles and other products. In 1966, Kayser-Roth acquired all of the capital stock of Stamina Mills, a textile manufacturer located on the Branch River in North Smithfield, Rhode Island. Kayser-Roth placed Stamina Mills within its Crown Division, a unit of Kayser-Roth's internal corporate organization, and retained Stamina Mills as a wholly owned

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[1] It is well settled that responsible parties are strictly liable under CERCLA. *E.g.*, *Monsanto*, 858 F.2d at 167; *Tanglewood East Homeowners* v. *Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985). In addition, they are jointly and severally liable when the environmental harm is indivisible. *E.g.*, *O'Neil* v. *Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990); *Monsanto*, 858 F.2d at 172; *United States* v. *Chem-Dyne Corp.*, 572 F. Supp. 802, 810-811 (S.D. Ohio 1983).

subsidiary until Stamina Mill's dissolution on December 31, 1977. Upon dissolution, Kayser-Roth received Stamina Mills' assets and assumed "all liabilities and obligations" of the subsidiary. Pet. App. 10a-12a.

At the time Kayser-Roth acquired Stamina Mills, the company was using a soap-scouring system to launder newly woven fabrics. In 1969, at Kayser-Roth's direction, Stamina Mills abandoned that system and installed a dry-cleaning system that used the solvent TCE in place of soap. In November of that year, there was a substantial release of TCE during a tank truck delivery to the site. In addition, Stamina Mills evidently discarded used TCE in a landfill at the site. Pet. App. 10a.

In 1979, the Rhode Island Department of Health discovered that TCE had contaminated residential drinking water wells in the area surrounding the Stamina Mills facility. EPA later conducted hydrogeologic studies and concluded that Stamina Mills was the source of the contamination. The extent and toxicity of the contamination qualified the site for the National Priority List, an inventory of sites posing the most pressing need for governmental cleanup. See 42 U.S.C. 9605(8)(A); 40 C.F.R. 300.66(c) (1989). EPA began clean-up and the government incurred $846,492.33 in initial removal costs. Pet. App. 11a.

3. The United States brought a CERCLA cost recovery action against Kayser-Roth and two other defendants. The government asserted that Kayser-Roth was potentially liable based, among other matters, on its role as an operator of the Stamina Mills facility at the time that hazardous substances were disposed of at that site. § 107(a)(2), 42 U.S.C. 9607(a)(2). The district court held a five-day bench trial in July 1989 and determined, based on extensive testimony and other evidence, that Kayser-Roth was liable

under CERCLA as an operator of the Stamina Mills facility. Pet. App. 1a-27a.[2]

The district court stated that "[o]rdinarily, a parent corporation cannot be deemed an operator based solely upon its status as a shareholder." Pet. App. 20a.[3] Rather, the question was "whether Kayser-Roth exercised control over Stamina Mills management and operations sufficient to find that Kayser-Roth was a de facto operator." *Id.* at 21a. The district court stated:

> The evidence establishes that Kayser-Roth was indeed an operator for purposes of CERCLA. Kayser-Roth exercised pervasive control over Stamina Mills through, among other things: 1) its total monetary control including collection of accounts payable; 2) its restrictions on Stamina Mills' financial budget; 3) its directive that subsidiary-governmental contact, including environmental matters, be funneled directly through Kayser-Roth; 4) its requirement that Stamina Mills' leasing, buying or selling of real estate first be approved by Kayser-Roth; 5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5,000; and finally, 6) its placement of Kayser-Roth person-

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[2] The district court also concluded that "due to the all encompassing control which Kayser-Roth had over Stamina Mills" the separate corporate identities of Kayser-Roth and Stamina Mills should be disregarded. Pet. App. 25a. As a consequence, Kayser-Roth was also liable as an "owner" of the facility. *Ibid.* The court of appeals did not reach the question whether Kayser-Roth is liable under that theory (*id.* at 8a n.11), and Kayser-Roth does not seek review of that issue in its petition (see Pet. 6 n.5, 15 & n.10).

[3] See also Pet. App. 20a ("The fact that the subsidiary was a member of the classes of persons potentially liable under CERCLA and that the parent had a substantial ownership interest in the subsidiary is insufficient to establish that the parent was an operator for CERCLA's purposes.").

> nel in almost all Stamina Mills' director and officer positions, as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out. These are only examples of Kayser-Roth's practical total control over Stamina Mills' operations.

Id. at App. 21a-22a. See also *id.* at 12a-14a. The district court credited the testimony of three former Stamina Mills presidents "that they played little or no role in major decisions affecting Stamina Mills, except with respect to the local details of operating the factory." *Id.* at 13a. Instead, "Kayser-Roth essentially was in charge in practically all of Stamina's operational decisions, including those involving environmental concerns." *Ibid.* Thus, it was Kayser-Roth, rather than Stamina Mills, that selected the TCE cleaning system that led to the release and consequent response costs. *Id.* at 22a. The court also cited "other examples of Kayser-Roth's participation in Stamina Mills' environmental decision-making." *Ibid.*

The court concluded that while "not singularly determinative on the issue of operator liability, these factors along with Kayser-Roth's other acts of pervasive control over Stamina Mills, warrant a finding that Kayser-Roth was an 'operator' for CERCLA purposes within the provisions of 42 U.S.C. § 9607(a)." Pet. App. 22a-23a.

4. The court of appeals affirmed the district court's judgment, rejecting Kayser-Roth's argument that a parent corporation "cannot, as a matter of law, be held liable" (Pet. App. 2a) for environmental hazards at a dissolved subsidiary. The court first observed that CERCLA imposes liability on any "person" who "owned" or "operated" a facility at the time that hazardous substances were disposed of at the facility. *Id.* at 3a. Thus, the court reasoned, under CERCLA "the legal structure of ownership" does not insulate from liability a "person" who operates the facility.

Id. at 3a-4a. Furthermore, because CERCLA defines a "person" to include a corporation, § 101(21), 42 U.S.C. 9601(21)), a corporation that operates a facility can be liable even if it does not own that facility. Pet. App. 4a. The court concluded that its "analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA." *Ibid.*

The court of appeals additionally observed that other courts had consistently construed the term "operator" to include corporate officers and shareholders who participate in the operation of a facility. Pet. App. 4a. See *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743-744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985). It concluded that a parent corporation that participates in the operation of a subsidiary's facility is similarly liable. Pet. App. 4a. The court noted that Kayser-Roth relied heavily on the Fifth Circuit's decision in *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (1990), petitions for cert. pending, Nos. 89-1973 (filed June 18, 1990) & 90-69 (filed June 25, 1990). The court explained that the Fifth Circuit's decision was not apposite:

> The *Joslyn* court framed its issue as whether to "impose direct liability on parent corporations for the violations of their wholly owned subsidiaries." Joslyn, 893 F.2d at 81. On the theory of the case presently under consideration, Kayser is being held liable for its activities as an operator, not the activities of a subsidiary.

Pet. App. 5a.

The court of appeals next examined "whether the district court correctly held that Kayser was an operator." Pet. App. 5a. The court first observed:

> Without deciding the exact standard necessary for a parent to be an operator, we note that it is obviously

> not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary. To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum, it requires active involvement in the activities of the subsidiary.

Ibid. The court reviewed the district court's findings that Kayser-Roth "exerted practical total influence and control over Stamina Mills' operations" (*id.* at 5a-6a) and concluded that "[s]uch control is more than sufficient to be liable as an operator under CERCLA" (*id.* at 7a).

ARGUMENT

Kayser-Roth contends that a parent corporation cannot be held liable under CERCLA for participating in the operation of a subsidiary's facility without first "piercing the corporate veil." Pet. 7, 8, 13, 15. The court of appeals correctly rejected that contention. The court of appeals' decision, which is entirely consistent with CERCLA's language and "the well-settled principle of limited shareholder liability" (*id.* at 7), does not conflict with any decision of this Court or of another courts of appeals. Accordingly, there is no warrant for this Court's review.

1. Kayser-Roth argues that the court of appeals erred in holding it liable for its participation in the operation of the Stamina Mills facility because "a corporate parent may be held directly liable as the 'operat[or]' of a facility owned and operated by one of its subsidiaries only if the corporate veil between the parent and subsidiary may be pierced." Pet. 8. See also *id.* at 7, 13, 15. Petitioner's argument is incorrect under both the plain language of CERCLA and settled principles of corporate law. Moreover, it ignores the

concurrent findings of the lower courts that Kayser-Roth—and not the Stamina Mills subsidiary—exercised "practical total influence and control over Stamina Mills' operations." Pet. App. 5a-6a, 13a.

As the court of appeals explained, CERCLA imposes liability on "any person"—including a corporation—that at the time of disposal of any hazardous substance "owned *or* operated" any facility at which such hazardous substances were disposed of. Pet. App. 3a-4a; see CERCLA §§ 101(21), 107(a)(2), 42 U.S.C. 9601(21), 9607(a)(2). The lower courts determined in this case that Kayser-Roth, which exercised "practical total control over Stamina Mills' operations" (Pet. App. 22a), was therefore liable as the operator of the Stamina Mills facility.[4]

Kayser-Roth principally argues that CERCLA does not impose liability on a parent corporation where—in the course of "routine oversight"—it "supervis[es]" the activities of its subsidiary. Pet. 9, 10, 11.[5] That argument fails to comport with the two lower courts' concurrent factual findings, which this Court normally accepts as correct. See, *e.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Those courts found that Kayser-Roth did not simply "supervis[e]" or conduct "routine oversight" of its subsidiary.

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[4] Kayser-Roth makes much of the fact that it did not hold title to the Stamina Mills facility. Pet. 9. As the court of appeals explained, however, that fact is of no moment because Kayser-Roth is not being held directly liable as an owner. Pet. App. 5a.

[5] See Pet. 9 ("the argument here is that Kayser-Roth, by closely *supervising the actions of its subsidiary*, controlled the operations of the facility") (emphasis in original); *id.* at 10 (Kayser-Roth was held liable "because of its assertedly close relationship with its subsidiary"); *ibid.* ("any involvement by Kayser-Roth occurred in the course of routine oversight of the activities of its subsidiary"); *id.* at 11 ("Congress's failure to include a similar express 'control' standard in the relevant portion of CERCLA weighs strongly against expanding the liability of corporate shareholders.").

Rather, "Kayser-Roth essentially was in charge in practically all of Stamina's operational decisions, including those involving environmental concerns." Pet. App. 13a. The lower courts determined that Kayser-Roth "operated" the facility because it participated in and ultimately made all important "operational decisions."[6]

Kayser-Roth's reliance on the "general rule" that "a corporation and its stockholders are deemed separate entities" (Pet. 9) accordingly is beside the point. Kayser-Roth is not being "held liable for the acts of Stamina Mills and its employees" (*ibid.*). The facts showed that Kayser-Roth itself, through its own employees, effectively operated the facility. Indeed, the court of appeals stated in the clearest possible terms, "Kayser-Roth is being held liable for its activities as an operator, not the activities of a subsidiary." Pet. App. 5a (emphasis in original).[7]

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[6] Both lower courts recognized that "it is obviously not the usual case that the parent of the wholly owned subsidiary is an operator of the subsidiary." Pet. App. 5a; see *id.* at 20a-21a. They concluded, however, that this was not the "usual case." The district court found that "[t]he only autonomy given the officers of Stamina Mills was that absolutely necessary to operate the facility on-site from day to day such as hiring and firing hourly employees and ordering inventory." *Id.* at 14a. Kayser-Roth contends, based on that limited autonomy, that only the now-dissolved Stamina Mills (and presumably its shift supervisors and purchasing agents) should be held liable for clean-up. Pet. 9. The courts below correctly rejected that contention. The person or entity actually "in charge" of a facility cannot escape liability on the ground that subordinates were allowed to exercise some limited measure of discretion. *See, e.g., Shore Realty Corp.*, 759 F.2d at 1052 ("LeoGrande is in charge of the operation of the facility in question, and as such is an 'operator' within the meaning of CERCLA.").

[7] Kayser-Roth's argument that CERCLA normally does not employ a "control" test (Pet. 11-13) is also beside the point. The lower courts did not employ a "control" test; rather, they examined whether "Kayser was an operator." Pet. App. 5a. In any event, Kayser-Roth's argument

Kayser-Roth's attempt to hide behind its subsidiary's "corporate veil" (Pet. 10, 11, 15) is unavailing. The "corporate veil" protects a parent corporation from being "held liable for the acts of its subsidiaries." 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 43, at 729 (rev. 1990). It does not protect the parent corporation from its own activities or those of its employees acting within the scope of their authority.[8] The court of appeals did not "create" this concept as "a new principle of shareholder liability" (Pet. 12, 15). Rather, it applied an established rule of corporate law in the CERCLA context. "It is a well-established rule that a corporation will be held liable for the torts and wrongful acts of its directors, officers, and employees within the scope of their authority." W. Knepper & D. Bailey,

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rests on an incorrect reading of the relevant CERCLA provisions. Kayser-Roth observes that CERCLA's definition of an "owner or operator" includes both "any person owning or operating such facility" and

> in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who *owned, operated or otherwise controlled* activities at such facility immediately beforehand.

§ 101(20)(A), 42 U.S.C. 9601(20)(A) (emphasis added). That latter portion of the definition addresses abnormal situations—such as bankruptcies or foreclosures—where the entity responsible for a facility may not technically hold title to the facility nor actively make operational decisions at the facility. See, *e.g.*, *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550, 1555 (11th Cir. 1990), cert. denied, No. 90-504 (Jan. 14, 1991). The use of the term "control" in that context does not suggest, as Kayser-Roth argues by negative implication (Pet. 12-13), that one who exercises active operational control at a facility is not an operator.

[8] Although the court of appeals found no need to reach the issue (Pet. App. 8a n.11), the district court concluded that there was a sufficient basis, in any event, for "piercing the corporate veil." *Id.* at 23a-25a. See note 2, *supra*.

Liability of Corporate Officers and Directors § 2.11 (4th ed. 1988).[9] Kayser-Roth became an operator of the Stamina Mills facility because its employees, acting within the scope of their authority, took charge of the operation of the Stamina Mills facility. See Pet. App. 6a, 21a-22a.

2. Kayser-Roth incorrectly argues that the court of appeals' decision conflicts with the Fifth Circuit's decision in *Joslyn Mfg. Corp.* v. *T.L. James & Co., supra.* As the court of appeals explained, there is no conflict. The issue in *Joslyn Mfg. Corp.* was whether to "impose direct liability on parent corporations for violations of their wholly-owned subsidiaries." 893 F.2d at 81.[10] In this case, by contrast, "Kayser

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[9] See, *e.g., United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are ultra vires of the corporation."); see also, *e.g.*, 10 *Fletcher Cyclopedia on the Law of Private Corporations* § 4877, at 323 (rev. 1986) ("corporations can commit almost any kind of a tort that individuals can commit, and are liable for the acts of their agents and servants in the same degree as natural persons are liable for the acts of their servants and agents * * *; that is now hornbook law, unless changed by statute"); R. Stevens, *Handbook on the Law of Private Corporations* 359 (2d ed. 1949) ("In applying the doctrine of respondeat superior to any master, corporate or noncorporate, the fundamental question is whether the servant acted within the actual or apparent scope of his employment.").

[10] The Fifth Circuit repeatedly framed the question, and its answer, in those terms. See also 893 F.2d at 82 ("Joslyn urges this court to read CERCLA's definition of 'owner or operator' liberally and broadly to reach parent corporations whose subsidiaries are found liable under the statute."); *ibid.* ("Joslyn asks this court to rewrite the language of the Act significantly and hold parents directly liable for their subsidiaries' activities."); *ibid.* ("CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries."); *id.* at 83 ("Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations."); *ibid.* ("Similarly, La. Rev. Stat. Ann. Section 30:2276

BEST AVA

is being held liable for *its* activities as an operator, not the activities of a subsidiary." Pet. App. 5a (emphasis in original).

Kayser-Roth observes that the United States, participating as amicus curiae in *Joslyn Mfg. Corp.*, suggested that the Fifth Circuit consider whether the parent corporation in that case was liable based on the parent corporation's own activities. Pet. 16-17. The Fifth Circuit, however, did not address that theory of liability. As we have explained in our response to the Court's invitation for the views of the United States in *Joslyn Mfg. Corp.*, the Fifth Circuit apparently declined to consider the government's theory because the parties did not squarely present it and because the record developed in the district court would not support it. See Brief for the United States as Amicus Curiae in *Joslyn Mfg. Corp.* v. *T.L. James Corp.*, Nos. 89-1973 & 90-69, at 9-12. The Fifth Circuit's failure to address that theory obviously does not create a conflict among the courts of appeals. *Id.* at 10-11.[11]

3. Kayser-Roth also contends that this Court should grant its petition "to eliminate the disruptive effects

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(West 1989 Supp.) does not impose direct liability on parent corporations for the acts of their subsidiaries.").

[11] Kayser-Roth asserts that "the question here plainly would have been decided the opposite way had this case arisen in the Fifth Circuit." Pet. 17. We disagree. The Fifth Circuit did not foreclose the possibility of holding a parent corporation liable based on the parent corporation's own acts, nor did it disagree with the district court's statements that the parent would be liable if it had been "actively involved" in its subsidiary's operations. See *Joslyn Mfg. Corp.* v. *T.L. James & Co.*, 696 F. Supp. 222, 232 n.20 (W.D. La. 1988). See also *Riverside Market Devel. Corp.* v. *International Bldg. Products*, No. 88-5317 mem. op. (E.D. La. May 23, 1990) (1990 WL 72249, *3-*4) ("If, as in the cases cited by Judge Stagg, [a shareholder] personally participated in the disposal of hazardous wastes, then he may be liable for the wrongful acts of the corporation even under Judge Stagg's Joslyn opinion.").

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flowing from the confusion that now plagues both the courts and the business community with respect to this important question." Pet. 19. The courts, however, have uniformly held—without violence to "the traditional principle of limited liability" (*ibid.*)—that a shareholder who actually participates in the operation of a facility can be held liable under CERCLA on the basis of that participation. See *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d at 743-744; *Shore Realty Corp.*, 759 F.2d at 1045. That is exactly what the court of appeals held in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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